No. 89-564

OCT 30 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE AND DOLORES GLOSEMEYER, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

~~MOTION AND~~ BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION AND MISSOURI FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

JOHN J. RADEMACHER *
General Counsel

RICHARD L. KRAUSE
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(312) 399-5795

RON MCMILLIN
MISSOURI FARM BUREAU FEDERATION
211 E. Capitol Street
Post Office Box 235
Jefferson City, Missouri 65102-0235
(314) 636-2177

Attorneys for Amici Curiae American Farm Bureau Federation and Missouri Farm Bureau Federation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-564

MAURICE AND DOLORES GLOSEMEYER, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation (AFBF) and the Missouri Farm Bureau Federation (MFFB) respectfully move for leave to file the attached brief amici curiae in support of the Petition for Writ of Certiorari. In support of the Motion, Applicants state as follows:

1. The American Farm Bureau Federation (AFBF) of Park Ridge, Illinois is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF has member state organizations in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families. AFBF has a stated policy goal

to protect the private property rights of landowners abutting abandoned railroad rights-of-way.

2. The Missouri Farm Bureau Federation (MFBF) of 701 S. Country Club Drive, Jefferson City, Missouri, is a voluntary, non-profit general farm organization comprised of 111 affiliated county Farm Bureaus with a membership of more than 77,000 member families. Its purpose is to represent, serve and protect the interests and rights of farmers and ranchers in Missouri, including the protection of private property rights. MFBF has a stated policy objective to protect the private property rights of landowners in abandoned railroad rights-of-way easements.

3. The protection of private property rights is of paramount importance to farmers and ranchers across the country. Many of those affected by the Rails-To-Trails scheme, both in Missouri and throughout the nation, are farmers and ranchers. Many of Petitioners herein are MFBF members.

4. The Rails-To-Trails scheme strikes at the very heart of the notion of private property rights. By seeking to indefinitely postpone the property interests of these landowners—interests that were freely bargained for and defined by specific easement grants between their predecessors in title and the railroads—the Rails-To-Trails scheme expressly denies these private property rights and alters those private agreements entered decades before.

5. Rails-To-Trails is a significant issue nationwide. AFBF counsel have been directly involved in such attempted conversions in nearly 20 states in every region of the country. The issues presented here are of paramount importance not only to farmers and ranchers, but to every private property owner across the United States.

6. AFBF and MFBF had actively participated as amici curiae in this case both before the federal district court

for the Eastern District of Missouri and the Eighth Circuit Court of Appeals. Moreover, AFBF has provided organizational support and other assistance to Petitioners at every stage in this proceeding.

7. AFBF and MFBF have also been actively involved in other cases concerning rails-to-trails issues, including the filing of briefs amici curiae in the *Preseault* case pending in this Court.

WHEREFORE, Applicants AFBF and MFBF respectfully pray for leave to file briefs *amici curiae* in support of the Petition for Writ of Certiorari and on the merits if the Petition is accepted.

Respectfully submitted,

JOHN J. RADEMACHER *
General Counsel

RICHARD L. KRAUSE
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(312) 399-5795

RON MCMILLIN
MISSOURI FARM BUREAU FEDERATION
211 E. Capitol Street
Post Office Box 235
Jefferson City, Missouri 65102-0235
(314) 636-2177

Attorneys for Amici Curiae American Farm Bureau Federation and Missouri Farm Bureau Federation

* Counsel of Record

Dated: October 30, 1989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

CONSTITUTION

STATUTES

REGULATIONS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-564

MAURICE AND DOLORES GLOSEMEYER, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION AND MISSOURI FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation (AFBF) and the Missouri Farm Bureau Federation (MFBF) respectfully move for leave to file the attached brief amici curiae in support of the Petition for Writ of Certiorari. A Motion for Leave to file this brief *Amici Curiae* is attached.

INTEREST OF AMICI CURIAE

The American Farm Bureau Federation (AFBF) of Park Ridge, Illinois is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF

has member state organizations in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families. AFBF has a stated policy goal to protect the private property rights of landowners abutting abandoned railroad rights-of-way.

The Missouri Farm Bureau Federation (MFBF) of 701 S. Country Club Drive, Jefferson City, Missouri, is a voluntary, non-profit general farm organization comprised of 111 affiliated county Farm Bureaus with a membership of more than 77,000 member families. Its purpose is to represent, serve and protect the interests and rights of farmers and ranchers in Missouri, including the protection of private property rights. MFBF has a stated policy objective to protect the private property rights of landowners in abandoned railroad rights-of-way easements.

The protection of private property rights is of paramount importance to farmers and ranchers across the country. Many of those affected by the Rails-To-Trails scheme, both in Missouri and throughout the nation, are farmers and ranchers. Many of Petitioners herein are MFBF members.

The Rails-To-Trails scheme strikes at the very heart of the notion of private property rights. By seeking to indefinitely postpone the property interests of these landowners—interests that were freely bargained for and defined by specific easement grants between their predecessors in title and the railroads—the Rails-To-Trails scheme expressly denies these private property rights and alters those private agreements entered decades before.

Rails-To-Trails is a significant issue nationwide. AFBF counsel have been directly involved in such attempted conversions in nearly 20 states in every region of the country. The issues presented here are of paramount importance not only to farmers and ranchers, but to every private property owner across the United States.

AFBF and MFBF had actively participated as amici curiae in this case both before the federal district court for the Eastern District of Missouri and the Eighth Circuit Court of Appeals. Moreover, AFBF has provided organizational support and other assistance to Petitioners at every stage in this proceeding.

AFBF and MFBF have also been actively involved in other cases concerning rails-to-trails issues, including the filing of briefs amici curiae in the *Preseault* case pending in this Court.

STATEMENT OF FACTS

The facts are as set forth by Petitioners. Most of the easements at issue here were negotiated prior to 1900, and specifically limit use of the right-of-way to railroad use.

INTRODUCTION

Beginning in the middle of the 19th century, our nation embarked on an aggressive policy of building a rail network linking all parts of the country. Railroads often obtained rights-of-way by negotiating easements from private landowners, such as Petitioners, for use as corridors for strictly railroad purposes.

In 1968, Congress enacted the National Trails System Act [16 U.S.C. 1241 *et seq.*] to increase recreational trail opportunities.

By 1983, Congress noted a "problem" with obtaining conversion of abandoned right-of-way for trails. That "problem" is well-settled state law [1] which states that a limited use railroad easement automatically lapsed when the property is no longer used for the intended purpose, restoring full title to the grantor landowners. The Rails-

---

[1] E.g., *Missouri-Kansas-Texas Ry. Co. v. Freer*, 321 SW. 2d 731 (Mo. App. 1959); *Pollnow v. State Department of Natural Resources*, 276 N.W.2d 738 (Wisc. 1979); and *Schnabel v. County of DuPage*, 428 N.E. 2d 678 (Ill. App. 1981).

To-Trails section [16 U.S.C. 1247(d)] was thus added to the National Trails System Act to remedy this "problem."

Section 1247(d) denies the interests of private landowners by two means: First, it makes the inherently illogical finding that recreational trail use is somehow a "railroad use."[2] Second, it preempts established state law, which provides that easements are extinguished when the railroad use of the property ceases.

Section 1247(d) thus seeks to legislatively extend the property interest of the railroad beyond the automatic expiration set forth in the easement grant, at the expense of the rights of the private landowners. The statute makes no provision for compensation to these landowners, and contemplates none. In fact, the statute is premised on tenuous assumptions that must expressly deny landowner compensation.

At least three federal Circuit Courts of Appeals have considered various aspects of the issue, with three different results. The Second Circuit, in *Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988), *cert. granted*, 57 USLW 3804 (1989), held that Rails-To-Trails could never be a "taking." By contrast, the D.C. Circuit held that rails to trails regulations could in some circumstances result in a Fifth Amendment taking, *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988). The Eighth Circuit below made no finding on the Fifth Amendment issue, stating that any remedy must be pursued in the Claims Court instead. Meanwhile, in the face of this judicial uncertainty, the ICC is blithely proceeding to allow creation of new trails every day, at the expense of landowners everywhere.

---

[2] This "key finding" "alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a railroad right-of-way is abandoned for railroad purposes there may be nothing left for trail use." (House Report No. 98-28, p. 8-9)

REASONS FOR GRANTING THE WRIT

I. THE ISSUE IS OF NATIONAL SCOPE AND IMPORTANCE

The Rails-To-Trails Conservancy estimates that there are approximately 150,000 miles of rail lines across the country. It also estimates that between 2,500 and 5,000 miles of these lines are abandoned every year. Trail advocates are increasingly using section 1247(d) to prevent return of these abandoned lines to their rightful owners by seeking their use as recreational trails. Farmers, ranchers and other abutting landowners are increasingly aware that they have rights to these abandoned corridors as a result of the terms of easements granted by their predecessors in title decades before. The undersigned AFBF counsel is personally working with landowners in nearly 20 states across the country who are being adversely affected by this scheme.

These cases are in various stages of administrative and judicial review. As indicated above, the signals coming from the federal Circuits that have addressed some of the substantive issues of the problem are mixed or confusing at best. Rather than prudently waiting for the judicial dust to settle, the ICC is forging ahead to effectuate trail conversions, often stretching even the bounds of the statute and its own regulations. The rights of private landowners are being adversely affected with every new ICC decision on the subject.

The case is not about the merits of additional recreational trails. It is about the methods employed to obtain those trails. It is about private property rights and landowners whose valid, vested rights are being ignored and trampled in the rush to create new trails.

This Court recognized the importance of the property rights issue involved by accepting the *Preseault* case for review this term. The large number of *amicus curiae* briefs filed in that case—including ones from AFBF and

MFBF—attest to the great interest from all sides in this issue.

The many pending cases both before agencies and the lower courts demand a full resolution of the issue. This case presents the issue from a different perspective than that in *Preseault*. Review of both aspects presented by these two cases will provide full resolution of the many issues that need to be decided.

II. THERE IS UNCERTAINTY AMONG THE CIRCUITS AND WITH THE ICC

We have indicated above that three federal Circuit Courts of Appeal have reviewed various aspects of this issue. That confusion is detailed in the Brief of Petitioners. Everyone affected by Rails-To-Trails is looking for a definitive resolution.

The Eighth Circuit decision below merely adds to the confusion. It says that the appropriate remedy is in the Claims Court for compensation. The D.C. Circuit on the other hand, in direct conflict with the decision below, says that 1247(d) "not only does not authorize the Commission to 'condemn' or 'take' railroad property, it does not specify any procedures to be used in appropriating such property and provides no guarantee of just compensation." [3]

It is also noteworthy that several of these cases, including this one, began in the state courts as quiet title actions. They were removed to federal court on the basis of the federal statute involved. One of the bases for removal is a uniform application of this statute. To date, that uniformity has not materialized throughout the Circuits. Only this Court can provide the direction needed.

---

[3] *National Wildlife Federation, supra,* at 700.

III. RAILS-TO-TRAILS VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST TAKING PRIVATE PROPERTY WITHOUT JUST COMPENSATION

The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use without just compensation." Statutes which (a) effect a "taking" of private property for public use, and (b) preclude compensation to affected parties, violate the Fifth Amendment and must be invalidated. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1017 (1984) and *Hodel v. Irving*, 481 U.S. 704 (1987). Section 1247(d) does both.

A. Section 1247(d) "Takes" Private Property

A fundamental principle of real property law is that a party cannot transfer an interest that it does not have. Another fundamental principle is that that interest is defined by the operative deed/grant.

The analysis is simple—by means of the easements, MKT no longer has an interest in the right-of-way once abandonment criteria are satisfied. By legislative fiat, section 1247(d) gives MKT the right to retain the easement for purposes of disposal to trail groups, at the expense of the interests of the landowners who would have reclaimed their property upon abandonment. Section 1247(d) "takes" a new easement from the landowners in favor of the abandoning railroad, bringing the Fifth Amendment into play. See *U.S. v. Causby*, 328 U.S. 256 (1946).

"Taking" of just such an easement was held unconstitutional in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Because it involved a regulatory taking, that case is not as close as the case at bench. The Court said:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt

> there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest . . . is to use words that deprive them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them." [4]

The Court continued: "Perhaps because this point is so obvious, we have not been confronted with a controversy that required us to rule on it."

This case presents that "controversy."

"Takings" are more readily found when there is a physical invasion of the property. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1974); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This Court has recently said:

> "We think a 'permanent physical invasion' has occurred for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." [5]

This is precisely the situation presented here with recreational trails.

Moreover, this Court has consistently held that the "property interests" subject to the Fifth Amendment are defined by state law. See *Ruckelshaus, supra.* As indicated above, state law vests property in the landowners upon a finding of abandonment. By preempting state law

---

[4] 97 L.Ed. 685.

[5] *Nollan, supra,* 97 L.Ed.2d at 686.

for the express purpose of altering that result, section 1247(d) "takes" the landowners interests.

There is no doubt that section 1247(d) "takes" private property.

B. The Statute Is Designed to Preclude Compensation to Landowners for the Property That Is Taken

The Eighth Circuit assumed for purposes of analysis that section 1247(d) "took" Petitioners' property. Its fundamental mistake is its ruling that compensation is available to petitioners through the Claims Court. This issue is very important to determine the scope of the Fifth Amendment.

Statutory invalidation is appropriate where Congress has expressly or impliedly precluded compensation. *Hodel v. Irving*, *supra*. As in *Irving*, section 1247(d) is silent on the issue. An examination of the purpose, intent and application of 1247(d) clearly shows that compensation to landowners is precluded.

First, its stated purpose was to remove the "problems" of landowner reversion that might hinder trail development. See p. 3, *supra*. It was to accomplish this by preempting state law that expressly recognized such rights. The law treats landowner rights as if they do not exist. If such rights (including a right to compensation) were even acknowledged, there would have been no reason for enactment of the law in the first place. Thus, section 1247(d) requires that landowner rights must necessarily be denied. Mere enactment of section 1247(d) to change existing law involves a denial of just compensation.

Second, the law is premised on continued ownership of the line by the railroad. The entire scheme depends on the disposition *by the railroad* to trail groups, and payment by such groups *to the railroad*. It seeks to extend the railroad easement by stating that abandonment may not occur if interim trail use is desired—a clumsy and illogical attempt to retain ICC jurisdiction over the line, and hence continued railroad ownership.

The very essence of the law being the continued ownership by the railroad, the rights of private owners must necessarily be disavowed in order for the scheme to work. To allow or infer a "just compensation" remedy would recognize possible landowner rights and thus destroy the very essence of the section 1247(d).

To engraft a just compensation remedy on section 1247(d) would mean that compensation would have to be paid *twice* for each right-of-way—once by the government to the landowners pursuant to the Fifth Amendment and also by the trail users to the railroad. We do not think that Congress intended such an absurd result.

Third, the ICC has admitted that it has no authority to pay compensation under this scheme. The Commission stated:

> "To recover under the Tucker Act, the Government must be authorized by Congress to take the action giving rise to the Tucker Act suit. *We have concluded that the Trails Act does not authorize condemnation of rights-of-way.*" (Emphasis added)[6]

In the same decision the ICC says: "The landowners fee interests cannot be taken under the Trails Act because the power to condemn *any interest in land* has not been delegated to us under the statute."[7]

Without that authority to condemn, a "just compensation" remedy is not available.

It is therefore not surprising that the D.C. Circuit held that just compensation was not a viable remedy in this situation.[8] The Eighth Circuit below failed to consider these factors in holding otherwise.

---

[6] *Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub No. 13), decided August 13, 1986, page 5.

[7] Op. Cit., page 4.

[8] See page 6, *supra*.

IV. THE EIGHTH CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW TO THE RAILS-TO-TRAILS SCHEME

If section 1247(d) is not a "railbank" statute as its proponents claim, it cannot be sustained on the basis of the Commerce Clause within the railroad regulatory framework in which it operates.[9]

In reviewing this important factor, the Eighth Circuit only applied the "rational basis test." In cases where Fifth Amendment takings are involved, however, *Nollan* requires more. The Court reiterated a stricter standard of review in such cases: "[W]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that the State '*could rationally have decided*' the measure adopted might achieve the State' objective." [10]

Nollan therefore requires looking behind the stated purpose of a statute to determine its *real* purpose, and whether the confiscatory action advances that purpose. A mere "rational basis test" is no longer sufficient. Section 1247(d) must therefore be examined in that light.

V. SECTION 1247(d) IS NOT A RAILBANK STATUTE

Even a cursory look at section 1247(d) shows that it cannot be sustained on the basis of a "railbank" objective.

First, railbanking itself is a chimerical concept. Any railroad that has taken the time and expense to pursue abandonment, take up tracks, discontinue tariffs and re-route traffic is not likely to incur the exorbitant costs to re-start service over a line that has been abandoned. Users of the abandoned line will have found other transportation arrangements. New industry to the affected

---

[9] Even if 1247(d) *is* found to be a valid exercise of the Commerce Clause, however, it can still be found in violation of the Fifth Amendment "takings" clause. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[10] *Nollan*, 483 U.S. at 834 (emphasis in original).

area will also have arranged other ways to satisfy their transportation needs.

Second, at the time of enactment of 1247(d) there was no national policy of "railbanking" as cited in the law. It is true that the idea was studied by the Department of Transportation, but the concept was *rejected.* (See *Availability and Use of Abandoned Railroad Rights-of-Way,* DOT, 1977.) The DOT concluded that there was no demand for railbanking, precisely for the reasons cited above. The limited railbanking provisions enacted by the Railroad Revitalization and Regulatory Reform Act of 1976 were repealed in 1980. Not only was there no such national policy, but policy was actually *opposed* to it.

A. "Railbanking" In Section 1247(d) Is Inconsistent With ICC Abandonment Authority and Jurisdiction

Proponents define "railbanking" as the preservation of lines for some nebulous and uncertain possibility that they might perchance again be used for rail use sometime in an undefined future.

Yet 49 U.S.C. § 10903 requires ICC to permit abandonment "only if the Commission finds that the present *or future* public convenience and necessity require or permit the abandonment or discontinuance." (Emphasis added). "Future" public convenience and necessity necessarily includes a determination whether or not the line is needed for future rail use—the very essence of "railbanking."

The paradox is that ICC can only invoke 1247(d) *after* finding that present or future public convenience and necessity requires abandonment. As ICC says: "In every Trails Act case, we will already have found that public convenience and necessity permit abandonment." [11] The ICC recognized the inherent inconsistency of 1247(d)

---

[11] *Rail Abandonments: Use of Rights-of-Way as Trails: Supplemental Trails Act Procedures,* 54 Fed. Reg. 8011, 8012 (1989).

with its long standing traditional authority under the Transportation Code:

> "However, the amendment appears to conflict with the Commission's statutory responsibilities under 49 U.S.C. § 10904. Under 49 U.S.C. § 10904, if the public convenience and necessity require or permit abandonment of a rail line or discontinuance of rail service, it must, within a specific time, issue a certificate permitting abandonment or discontinuance. Under 16 U.S.C. § 1247(d), if a party seeks to use the underlying right-of-way for a trail and is willing to comply with certain requirements, the Commission may not permit an abandonment or discontinuance 'inconsistent' with trail use." [12]

While ICC has yet to resolve these inherent conflicts, it nevertheless is approving new trails all the time.

B. The Purpose of Section 1247(d) Is Development of Recreational Trails

"This purpose, if one goes along with the ICC, is expressly to preserve ROW's for 'future rail operations'—a complete myth if there ever was one, and both sides know it." [13] This statement, by the trails proponents, accurately summarizes the feelings of Congress, the ICC, and all parties affected by 1247(d). This is a trails law, not a railbank statute. Several factors illustrate this conclusion.

First, the statute itself states that its purpose is to "encourage State and local agencies and private interests to establish appropriate trails using the provisions of programs such as rail programs." It directs the ICC to "not permit abandonment or discontinuance inconsistent or disruptive of such [interim trail] use." It was added

---

[12] *Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub No. 13), decided February 11, 1985, page 2.

[13] Newsletter of BSTRA, Inc. and the Southern New England Trails Conference, Sept. 1986, p. 2.

to the National Trails System Act, not to the Transportation Code with which it is inherently inconsistent.

The House Report accompanying section 1247(d) states:

> "The concept of attempting to establish trails only after the formal abandonment of railroad rights-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there is nothing left for trail use. This amendment would ensure that interim trail use is considered prior to abandonment."[14]

The ICC admits the true purpose of the law even more bluntly:

> "This language demonstrates that the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreational uses when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interest." [15]

The transparency of any lofty "railbanking" goals is thus shattered by the candid admissions of the body that enacted the law and the agency entrusted with its enforcement.

C. The Rails-to-Trails Scheme Itself Refutes the "Railbank" Rationalization

The scheme itself demonstrates that the true purpose of the law is to develop recreational trails, and has nothing to do with "railbanking."

a. There is no requirement that ICC find a line that is proposed for abandonment suitable or necessary for rail-

---

[14] H. Rep't No. 98-28, 98th Cong. 1st Sess., page 8.

[15] *Railroad Abandonments--Use of Rights-of-Way as Trails,* Ex Parte 274 (Sub No. 13), served May 6, 1986, page 7.

banking.[16] In fact, the *opposite* finding is required (see p. 12, *supra*). ICC has even expressly indicated that it will *not* determine whether "railbanking" is feasible.[17] Rather, ICC will only determine whether the Trails Act is applicable. Without at least this nexus, railbanking must be considered only a facade for the real purpose of the law.

b. Only parties interested in developing trails have authority to invoke section 1247(d). [49 CFR 1152.29]. Not only does neither the ICC nor the railroad have authority to invoke the statute, but such decisions are left solely to those who have no interest in future rail use of the line. In order to preserve their trails, such groups would not want to see resumption of the line. Also, such decisions are made, not on the basis of railbanking, but on the suitability of the line as a trail.

c. Once trail interest is expressed, the decision to transfer is voluntary with the railroad. See *National Wildlife Federation v. ICC, supra*; *Washington State Department of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987) and *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479 (2d Cir. 1986).

This decision does not require any commitment by the railroad to even consider a resumption of service in the future. Rather, the law allows the railroad to receive a windfall for a right-of-way that they have already abandoned. The windfall is at the expense of the landowners. Moreover, the law allows the railroad to leave bridges and trestles that it would otherwise cost exorbitant amounts to remove. Thus, decisions to pursue trail use

---

[16] In fact, in this particular case, the opposite finding was made. The ICC found the line was subject to flooding and major repairs would have to be done. See *M-K-T—Abandonment, ICC Dock. No. AB-102 (Sub No. 13)* March 6, 1987, pages 3 and 5.

[17] See *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, decided December 2, 1987.

should not be construed as evidence that they intend to resume service. Rather, it allows the railroad to receive something for nothing.

d. Trail users also have absolute authority to terminate a "railbank" if the railroad has not sought to resume service before the trail user grows tired of it. [49 CFR 1152.29(c)(2)]

Thus, the ICC, railroads, and shippers who would be most interested in future rail use not only have no authority to invoke "railbanking" under 1247(d), but they do not have authority to terminate it if the Railroad has not intervened to resume service during the period of trail use. Only trail users have that authority in both cases. Such is the true nature of 1247(d).

Perhaps the most damaging indictment of the falsity of the "railbank purpose is that the ICC, the agency entrusted with its enforcement, has actually advised trail users *how to defeat railbanking and avoid future rail service.* In its implementing decision, the ICC actually states that under "certain circumstances . . . trail developers may find it advantageous not to invoke section 1247(d) and thereby avoid the property being subject statutorily to future restoration of rail service," and then goes on how to accomplish this.[18] This is hardly appropriate behavior for an agency that is promoting a "rail bank" policy. It is appropriate for an agency promoting trail development.

Nollan requires that there be a clear "nexus" between the desired end and the means employed. It is clear that no such nexus exists to support a railbank purpose. The program is entirely in the hands of trail users, who have no interest in future rail service. Trail users have sole authority to both invoke and terminate application of 1247(d). There is no required finding of suitability of

---

[18] Decision of April 16, 1986, *supra*, at page 8.

future rail use. In any event, future resumption of service over an abandoned line is remote at best and virtually nil.

In *National Wildlife*, the D.C. Circuit was "unable, therefore, to conclude that existing precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future." 850 F.2d at 708.

CONCLUSION

Nearly 100 years ago, Petitioners' predecessors in interest in good faith granted a right to a railroad to use their property to operate a railroad. That line stopped running several years ago.

Under the easement, Petitioners should now have their property back. Yet when they tried to reclaim it they were prevented from doing so by a federal statute which decrees that the land now belongs to a trail group to use in a manner that has nothing to do with railroad use.

Section 1247(d) is a transparent and convoluted attempt to make sure that Petitioners are deprived of their private property rights in the right-of-way. To achieve that purpose, it had to make the illogical and inherently contradictory finding that recreational trail use is somehow a "railroad use." Similar scenes are being played out across the country. ICC and trail users continue to ignore valid, vested property rights. Numerous cases have been filed to protect and reclaim those rights.

The Fifth Amendment "takings" clause was specifically added to the U.S. Constitution to protect private citizens from having their property rights so blatantly and cavalierly tramp'ed. Justice and the Fifth Amendment demand that section 1247(d) be invalidated.

The decision below ducks the issue. It fails to recognize that compensation is not the answer in all cases, especially where the statute expressly denies such rights.

AFBF and MFBF respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN J. RADEMACHER *
General Counsel

RICHARD L. KRAUSE
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(312) 399-5795

RON MCMILLIN
MISSOURI FARM BUREAU FEDERATION
211 E. Capitol Street
Post Office Box 235
Jefferson City, Missouri 65102-0235
(314) 636-2177

Attorneys for Amici Curiae American Farm Bureau Federation and Missouri Farm Bureau Federation

* Counsel of Record

Dated: October 30, 1989